APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SEPTEMBER TERM, 1972

No. 353

Argued: January 11, 1973 Decided: March 8, 1973

Docket No. 72-1800

COLUMBIA BROADCASTING SYSTEM, INC.
CALVADA PRODUCTIONS, a joint venture,
JACK CHERTOK TELEVISION, INC., and
DENA PICTURES INCORPORATED,
Plaintiffs-Appellants,

v.

TELEPROMPTER CORPORATION and
CONLEY ELECTRONICS CORPORATION,
Defendants-Appellees.

Before: LUMBARD, KAUFMAN and MANSFIELD, Circuit Judges.

Appeal from a judgment of the Southern District of New York (Constance Baker Motley, J.) holding that appellees did not infringe appellants' copyrights and dismissing appellants' action.

Affirmed in part and reversed and remanded in part.

Asa D. Sokolow and Seymour Graubard, New York, New York (Rosenman Colin Kaye Petschek Freund & Emil, for appellant Columbia Broadcasting System, Inc.; Marshall, Bratter, Greene, Allison & Tucker, for appellant Calvada Productions

Alexander & Green, for appellant Jack Chertok Television, Inc.; Graubard, Moskovitz, McGoldrick, Dannett & Horowitz, for appellant Dena Pictures, Incorporated, on the brief) for appellants.

Robert C. Barnard (Cleary, Gottlieb,, Steen & Hamilton, R. Michael Duncan, of counsel, New York, New York and Washington, D.C.; Katz, Rosensweig & Sindle, David Z. Rosensweig, of counsel, New York, New York, on the brief), for appellees.

Paul, Weiss, Rifkind, Wharton & Garrison, Herman Finkelstein, Simon H. Rifkind, Jay H. Topkis and Paul L. Laskin, New York, N.Y., on the brief, amicus curiae for American Society of Composers, Authors and Publishers.

Stuart F. Feldstein, Charles S. Walsh and Stephen A. Gold, Washington, D.C., on the brief, amicus curiae for National Cable Television Association, Inc.

Phillips, Nizer, Benjamin, Krim & Ballon, Louis Nizer, Gerald Meyer and Gerald F. Phillips, of counsel, on the brief, amicus curiae for Motion Picture Association of America, et al.

LUMBARD, Circuit Judge:

Plaintiffs-appellants, Columbia Broadcasting System, Inc. (CBS), Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Incorporated appeal from a final judgment entered after trial in the Southern District. Appellants commenced this copyright infringement action[1] against defendants-appellees, Teleprompter Corporation (Teleprompter) and its subsidiary Conley Electronics Corporation, who own and operate numerous Community Antenna Television (CATV) systems throughout the country. Appellants are creators and producers of television programs that were protected by statutory copyrights and that were initially licensed by the CBS Television Network, a division of CBS, to its affiliated television stations for simultaneous broadcast. The complaint alleged that the teleprompter cable systems intercepted the signals of television stations broadcasting appellants' copyrighted works and then channeled these programs to their paying subscribers without authorization or license, thereby in-

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[1] The original action was commenced on December 11, 1964. Attempts to consolidate this action with United Artists Television v. Fortnightly, 255 F.Supp. 177 (S.D.N.Y. 1966), aff'd 377 F.2d 872 (2d Cir. 1967), rev'd 392 U.S. 390 (1968), in the district court were unsuccessful. The parties voluntarily stayed proceedings in this case while *Fortnightly* was on appeal. After the *Fortnightly* decision, supplemental complaints were filed on December 15, 1969 and May 17, 1971.

fringing appellants' copyrights.[2] After trial,[3] the district court, holding that the reception of telecasts of appellants' copyrighted programs by Teleprompter's

[2] Appellants claim to have been injured because Teleprompter CATV systems distributed signals of stations carrying the copyrighted programs to viewers who could not otherwise have received them. When a CATV system brings a program into its market from a more distant television market, appellants assert that this has a serious adverse impact on the copyright holder's ability to license that program for later presentation in the importing market.

We have been informed by one of the *amici* that a copyright holder usually licenses his programs first to a network and later to local stations for broadcast. The larger markets are ordinarily licensed first because of the greater demand caused by competition among the more numerous broadcast stations in those markets. We are told that if a CATV system brings into the smaller markets programs that are broadcast by network or independent stations in the larger markets, it reduces the potential audience for that program when it is later licensed for exhibition by a local station. As a result, the fee that the station in the smaller market is willing to pay for the right to broadcast the program will diminish, appellants assert, to the injury of the copyright holder.

Teleprompter has argued that the copyright holder can demand a greater fee from the broadcast station in the larger market in light of the greater audience that will now view the programs as a result of CATV. However, appellants have responded, and we must agree, that the amount that a broadcast station is willing to pay for the privilege of exhibiting a copyrighted program is economically tied more to the fees that advertisers are willing to pay to sponsor the program than to some projected audience size. No evidence was presented in the court below to show that regional or local advertisers would be willing to pay greater fees because the sponsored program will be exhibited in some distant market, or that national advertisers would pay more for the relatively minor increase in audience size that CATV carriage would yield for a network program. Indeed, economics and common sense would impel one to an opposite conclusion.

[3] By pre-trial order, the trial of this case was divided into separate stages. The first stage, on appeal here, concerned the issue of whether or not Teleprompter had infringed appellants' copyrights.

CATV systems and the distribution of these programs to CATV subscribers did not infringe appellants' copyrights, entered judgment dismissing the complaint. From that judgment, appellants have taken this appeal.

The pertinent facts were the subject of two lengthy stipulations and are basically undisputed. The legal issue concerns the proper interpretation to be given to § 1(c) and (d) of the Copyright Act of 1909, 17 U.S.C. § 1(c) and (d).[4] This provision gives the copyright holder the exclusive right, *inter alia*, to perform the copyrighted work. The issue here, therefore, is whether Teleprompter's CATV systems "performed" the copyrighted works within the meaning of this provision. In resolving this question, we are not writing on a clean slate, for the Supreme Court, on somewhat different facts, considered the meaning of "perform" in this provision in

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[4] "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

. . .

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever . . . and

(d) To perform or present the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce, or reproduce it, in any manner or by any method whatsoever . . ."

Fortnightly Corp. v. United Artists, Inc., 392 U.S. 390 (1968). Relying on *Fortnightly*, the district court held that the CATV systems here did not "perform" the copyrighted works.

The allegations of infringement were limited to an illustrative group of copyrighted programs. Similarly, the complaints charged five specific and illustrative CATV systems with having infringed appellants' copyrights, although presumably other CATV systems owned by Teleprompter conducted similar activities. As a result, the copyright claims at issue involve, and are limited to, the operations of Teleprompter's CATV systems in five cities at stated periods: Elmira, New York in November 1964; Farmington, New Mexico in November 1964, June 1969, and March 1971; Rawlins, Wyoming in June 1969; Great Falls, Montana in June 1969; and New York City in June 1969 and March 1971. A knowledge of the operations of each of these systems is essential to an understanding of our resolution of the issues.

Elmira: In November 1964, the date of the only infringement alleged with regard to the Elmira CATV system, the system had the capacity to carry twelve television channels. It received and provided its viewers with the programs of ten television broadcast stations located in Elmira and in communities varying from 46 to 173 miles away. Broadcasts from CBS affiliates, as well as from some stations with other network affiliations, in Buffalo (119 miles), Scranton (76 miles), Syracuse (64 miles), and Binghamton (46 miles) were received off-the-air[5] at the

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[5] The term, "off-the-air," will be used throughout this opinion to indicate the reception of broadcast television signals by means of an antenna or similar receiving equipment. We use the term, "broadcast," in accordance with the definition given to "broadcasting" in 47 U.S.C. § 153(o). Thus, "off-the-air" reception does not include the reception of microwave transmission. See note 6, *infra*.

system's antenna site on a hill adjacent to Elmira and were made available to the system's subscribers. Because of distance and topographical conditions, satisfactory reception of the stations in Buffalo and Scranton is not available by means of rooftop antennas in most locations in and around Elmira. Satisfactory reception of the Syracuse stations is available only in some locations in the northern portion of Elmira. One of the Binghamton stations can be satisfactorily received from rooftop antennas, but the other station cannot. In addition, the Elmira system had two channels that were provided by means of microwave links.[6] One of these was licensed to the school system, which originated educational programming that was transmitted by microwave from the schools to the CATV system for distribution. The second microwave had served to connect the system with an antenna nearer New York City, where a New York independent station was received off-the-air. None of the copyrighted programs was broadcast by this independent station.

Farmington: On two of the dates of alleged infringement, November 1964 and June 1969, Teleprompter operated a five-channel system in Farmington. The system received and distributed to its subscribers the signals of four broadcast stations, all of which were received off-the-air on antennas located on a mesa thirty miles from

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[6] A microwave link involves the transmission of signals through the air. However, microwave transmission in itself is not broadcasting. A broadcast signal, according to 47 U.S.C. § 153(o), is transmitted by a broadcaster for "[reception] by the public." In the case of microwave, the signal is focused and transmitted in a narrow beam aimed with precision at the receiving points. Thus, microwave transmission is point-to-point communication. The receiving antenna must be in the path of the signal beam. If the transmission must cover a considerable distance, the microwave signal is transmitted to the first receiving point from which it is re-transmitted to another receiving point, and this process is repeated until the signal reaches the point from which it is distributed by cable to subscribers.

Farmington. Originally, all the stations were from Albuquerque, New Mexico (144 miles from Farmington); later, a station from Durango, Colorado (43 miles) was added during periods when one of the Albuquerque stations was not broadcasting. Because of distance and mountainous terrain, reception of the Albuquerque stations directly off-the-air by means of rooftop antennas was not feasible. However, the Albuquerque stations, including the CBS affiliate that broadcast the copyrighted programs, were received in Farmington on rooftop antennas because they were rebroadcast by "translators"[7] under a license issued by the Federal Communications Commission and pursuant to authorization given by CBS and the station. The mountainous terrain also made it impossible to receive by means of rooftop antennas the Durango station, which is also a CBS affiliate. This Durango station, however, entered into a letter agreement with the Farmington CATV system in which it authorized the latter to distribute the station's programming to its subscribers.[8]

By March 1971, the third date of alleged infringement, the system had been rebuilt with twelve-channel equipment. At this time, it received and distributed the broadcasts of nine stations: four from Albuquerque, one from Durango, and four independent stations from Los Angeles (600 miles from Farmington). Obviously, the Los Angeles stations were not receivable from rooftop antennas in Farmington. These stations were received on an antenna located approximately fifty miles from Los Angeles and linked with the Farmington system by a microwave system, 1300 miles in length.

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[7] A "translator" is a television broadcast translator station that is authorized to rebroadcast a specific station's signals.

[8] Teleprompter has not attempted to show that this letter agreement amounts to an authorization or license for its carriage of the copyrighted programs. The parties stipulated that no such authorization or license was requested or received.

On the one additional channel available to the system in 1964 and 1969, it originated some limited programming, which consisted of general interest programs such as local news, sports, and movies, an automated time and weather scan,[9] and occasionally some educational programs. When the channel capacity had increased in 1971, the automatic time and weather scan was originated on a non-broadcast channel[10] on a full-time basis. On a second non-broadcast channel, educational programming was offered. And on the third available channel, the CATV system originated twenty hours per week of general interest programs.

Rawlins: At the time of the alleged infringement, in June 1969, the Rawlins CATV system had a twelve-channel capacity. The system received and made available to its subscribers programming from six broadcast stations, five from Denver, Colorado (184 miles from Rawlins), on which the copyrighted programming was carried, and one from Casper, Wyoming (87 miles from Rawlins). The system received the Denver stations, which could not be received in Rawlins from rooftop antennas, off-the-air on antennas located ninety miles from Denver, and transmitted them by microwave link to Rawlins. The Casper station was received off-the-air on an antenna located at the edge of town. Because of mountainous terrain, reception of the Casper station directly off-the-air by rooftop antennas was not generally possible; however, the Rawlins audience did receive its broadcasts as a result of rebroadcasts by a translator. At the time of the alleged infringement, the only program origination on non-broadcast channels that

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[9] This consisted of an automated camera that scanned clock and weather dials.

[10] A "non-broadcast channel," as used in this opinion, is a channel that offers a CATV system's own original programming but does not offer programs received from broadcast stations.

the CATV system produced was an automated time and weather scan.

Great Falls: The Great Falls CATV system was a twelve-channel system at the time appellants allege it to have infringed their copyrights. It received and distributed to its subscribers programming of nine broadcast stations. Three of the stations (including the one that broadcast the program whose copyright is alleged to have been infringed) were in Spokane, Washington (286 miles from Great Falls), one was in Lethbridge, Canada (163 miles away), two were in Salt Lake City (466 miles away), and one was in Helena (71 miles away). The system received the signal of each of these stations off-the-air by means of antennas located at varying distances from the originating stations (17 to 95 miles) and transmitted it by microwave to a point in Great Falls, from which it was distributed by cable to the system's subscribers. Because of distance, mountainous terrain, and the limitations of the individual stations, the Great Falls audience could receive none of these broadcast stations by means of rooftop antennas. In addition, the system received the signals of two Great Falls stations off-the-air by means of antennas located in the community, and distributed these signals to its subscribers. On a non-broadcast channel, the system offered an automated time and weather scan. On another non-broadcast channel, the system originated ten hours per week of movies and local interest programs.

New York: At the time of the first alleged infringement, in June 1969, Teleprompter's New York CATV system had a twelve-channel capacity. By March 1971, the time of the second alleged infringement, its capacity had increased to thirteen channels. Under the terms of the system's franchise, it must receive and distribute all eleven New York City stations and is barred from importing any stations from outside New York City. From time

to time microwave has been used to connect the system's main antenna with two subsidiary antennas. The signals of the New York stations were received off-the-air by these antennas and distributed by cable to the subscribers. The New York system, on its non-broadcast channels, offered several forms of automated originations, in addition to originating from forty to seventy hours of local and general interest programming per week. In connection with one of the latter types of originations, a sports event, the Teleprompter system sold some commercial time and interconnected with other CATV systems in the New York area.

I. *Fortnightly Corp. v. United Artists, Inc.*

The starting point in our analysis of appellants' copyright-infringement claims must, of course, be the Supreme Court's decision in Fortnightly Corp. v. United Artists Television, Inc., *supra*. In deciding whether the Fortnightly CATV system "performed," within the meaning of the Copyright Act, the programming that it provided to subscribers, the Court applied a functional test and held that the CATV system there involved was functionally related more to the television viewer, who does not "perform," than to the television broadcaster, who does "perform." In this regard, Mr. Justice Stewart, speaking for the Court, said:

> The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and

viewers as members of a theatre audience. Broadcasters perform. Viewers do not perform. . . .

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. *Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals;* it provides a well-located antenna with an efficient connection to the viewer's television set. (Emphasis added.) pp. 398-99.

The teaching of *Fortnightly* is that a CATV reception service that receives broadcast signals off-the-air from an antenna or other receiving equipment erected within or adjacent to the community it serves, and distributes the programming received to subscribers, does not "perform" the programs and, thus, is not subject to copyright liability, even though the subscribers could not otherwise receive the programs without the aid of CATV. Appellants correctly note that the operations of each of the CATV systems involved here were different and broader than those of the system before the Supreme Court in *Fortnightly*. Fortnightly's system provided a simple reception service and consisted of "antennas located on hills above each city with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers." *Fortnightly*, p. 392. Although *Fortnightly* was decided in 1968, the litigation in that case had been instituted in 1960, and, as a result, the Court considered CATV in a state of technology that was then eight years out-of-date. Hence, the Court did not have before it a system that originated programming on non-broadcast channels, that sold commercials on its origination programming, that had the capacity to interconnect with other CATV systems, that utilized microwave links in bringing broadcast signals to its subscribers, and that imported signals from stations located

hundreds of miles away from the community that the system was intended to serve. Appellants' counsel inform us that the Supreme Court was made aware of the changing technology of CATV by counsel for *amici* and by counsel for Fortnightly (who represent Teleprompter here). Indeed, the Court's opinion in at least two places implied that it was aware of this fact and was not necessarily laying down a broad rule to apply to all CATV systems regardless of the nature of their operations.[11]

The question before us is whether the character of CATV is so changed by the additional services that the cable systems here have undertaken that their total operation, including the reception service, under the *Fortnightly* functional test, have become functionally equivalent to those of a broadcaster, and thus these systems should be deemed to "perform" the broadcast programming that they distribute. The additional operations undertaken by these CATV systems, which appellants contend distinguish this case from *Fortnightly* and bring about this asserted metamorphosis in the character of CATV, are the following: 1) origination of programming on non-broadcast channels, and the sale of commercial time on such non-broadcast programming; 2) interconnection with neighboring CATV systems; 3) use of microwave links in bringing broadcast programming to subscribers; and 4) the importation of distant broadcast signals from outside the area served by the CATV system. We shall consider in order the effect of each of these operations on the application of the *Fortnightly* doctrine to the CATV systems involved.

II. *Non-broadcast Program Origination*

At the outset, we reiterate that what is involved here is the origination of programming on channels not used

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[11] *See* Fortnightly Corp. v. United Artists, Inc., 392 U.S. 390, 392 n. 6, and 399 n. 25 (1968).

for the distribution of broadcast signals and the sale of commercials on such non-broadcast channels. We do not have before us, and thus do not consider, the question of what the effect would be on the *Fortnightly* doctrine if programs originated by the CATV system were used to replace selected broadcast programming received from network or independent stations that would otherwise have been distributed without alteration to subscribers on broadcast channels. Similarly, we do not have before us a CATV system that sold commercials on broadcast programming to replace the commercials sold and transmitted by the broadcast station.

Although the Supreme Court noted in *Fortnightly* that it was not dealing with a CATV system that originated non-broadcast programming,[12] we fail to see why a system's program origination on channels other than those on which it relays broadcast programming should alter the result in *Fortnightly*. Obviously, the system "performs" these programs that it originates for distribution to its subscribers. However, we do not see the logic in appellants' contention that this program origination serves to convert the CATV system into a "performer" of those programs that it distributes to its subscribers on broadcast channels. Even though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a "performer" of the broadcast programming when it offers both origination and reception services, but remains a non-performer when it offers only the latter.

In support of their contention, appellants point to Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944). In that case, the defendants had argued that

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[12] Note 11, *supra*.

they should not be subject to copyright liability for programs that they broadcast without advertising support but merely as a service to their listeners. This court rejected that contention, noting that the programs, even without advertising, served to increase the total number of station listeners and thus helped to maintain the station as a successful financial entity. Appellants argue that *Debs* supports their position that the various functions of the CATV systems should be considered as a whole to determine whether the system is functionally equivalent to a broadcaster, in which event it should be deemed a "performer" with regard to all programming it relays to its subscribers. This argument is but a general statement of appellants' particular contention that non-broadcast program origination converts the system into a "performer" with regard to broadcast programming distributed to subscribers.

Debs, however, does not support either proposition. The issue there was not whether the programs had been "performed"—indeed, having broadcast the programs, the station could hardly contend it was not a "performer"—but whether the programs had been performed *"for profit"*; and one can readily see that indirect "profit" accrued to the station in *Debs* as a result of its unadvertised broadcast of these programs. That decision is not authority for appellants' broad proposition that the operations of a CATV system must be viewed and evaluated for copyright purposes as a whole; and, thus, neither can it support the contention that a system's non-broadcast program origination converts it into a "performer" of broadcast programs distributed to subscribers by its reception service.

Therefore, we hold that the fact that certain of the CATV systems involved here originated programming on non-broadcast channels did not make them "performers," for copyright purposes, of broadcast programming distributed to subscribers. A contrary approach would be unneces-

sarily wooden and mechanical in its application of copyright law to CATV.[13]

With regard to the sale of commercial time on non-broadcast programming, although this is another step bringing cable origination programming in competition to some extent with broadcast programming, again, we do not agree with appellants' position that there is some sort of "spillover" effect by which the system becomes a "performer" with regard to its reception service.

III. *Interconnection*

As noted earlier, Teleprompter's New York CATV system has occasionally interconnected its facility with those of the two other CATV systems operating in the New York area. Appellants analogize this activity to the networking that is common among broadcast stations, and they point to this as another factor making the New York system functionally equivalent to a broadcaster. However, the only interconnection with which we are concerned occurred in two instances of sporting events that the system originated on non-broadcast channels. There was no interconnection here relating to the reception of any telecast of appellants' copyrighted programs, or indeed of any broadcast programming, received by the system and distributed to subscribers. Therefore, we are not presently in a position to evaluate what effect interconnection may have on CATV copyright liability if and when it ever reaches the point at which it is equivalent to a network of CATV systems. In light of the minimal interconnection we have

[13] The Federal Communications Commission has adopted rules, which appear in 47 C.F.R. § 76.201, requiring CATV systems with more than 3,500 subscribers to commence program origination, which is known in industry parlance as "cablecasting." These rules were suspended pending judicial review of the FCC's CATV rules. Although FCC authority over CATV was sustained in United States v. Midwest Video, 405 U.S. 649 (1972), the FCC has not yet reinstated the rules.

before us, we must agree with the district court that "[w]hatever this brief interconnection may portend for the future, it [did] not transform [Teleprompter's] present CATV system into a broadcasting network as [appellants] suggest."

IV. *Microwave*

A relatively recent development in CATV technology that was not before the Court in *Fortnightly* is the use of microwave to transmit a broadcast signal from the point of its reception off-the-air to the point from which it is distributed by cable to the homes of subscribers. Typically, microwave is used to import distant signals into the CATV community, an activity the effect of which on the issue before us we shall consider below.[14] However, the use of microwave is not necessarily limited to this activity.

Appellants contend that the use of microwave, in and of itself, is sufficient to make a CATV system functionally equivalent to a broadcaster and thus subject to copyright liability for all the programming it receives and distributes to its subscribers. We are unconvinced by this contention. Neither do we believe that the use of microwave makes the system a "performer" only of that programming with respect to which the microwave is used. Microwave utilizes point-to-point communication and is merely an alternative, more economical in some circumstances, to cable in transmitting a broadcast signal from one point in a CATV system to another. Hence, we see no reason to attach legal

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[14] Although we consider them separately, the use of microwave and the importation of distant signals are often very closely connected, in the sense that microwave links are the usual means by which a CATV system imports distant signals. As is evident from the experience of the New York system, however, it is possible for microwave to be used apart from distant signal importation, and it is in this sense that we consider in this section of the opinion the effect of microwave on the application of *Fortnightly* to CATV systems.

significance, in terms of copyright liability, to the decision to utilize microwave links.

V. *Importaton of Distant Signals*

Appellants' final, and in the end, most persuasive contention relates to the fact that certain of the CATV systems involved here distributed to their subscribers signals from broadcast stations located many miles from the communities served by the systems. In CATV parlance, this is known as the importation of distant signals. This activity was not before the Supreme Court in *Fortnightly*, and appellants contend that that decision did not signify that a CATV system does not "perform" a copyrighted television program when it brings the signal in from another community, often from another television market, and distributes that signal to subscribers.

The CATV system in *Fortnightly* brought television signals to viewers who could not otherwise have received them. However, these signals were already in the community and were not imported by the CATV system from another community, as is evidenced by the fact that the system received them from an antenna located in or directly adjacent to the CATV community. It was only because of topographical conditions in and around the community that residents could not receive the signals on their receivers. Thus, it was the office of the CATV system in *Fortnightly* to use its advanced antenna technology and equipment to overcome these adverse conditions and thereby to bring the signals to members of the community. The Supreme Court held that, in performing this function, the CATV system did not "perform," within the meaning of the Copyright Act, the programming carried on those signals. However, in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), decided just one week before *Fortnightly*, the Court explicitly recognized that this was only one of two major services that CATV systems render

to the communities they serve. In this regard, Mr. Justice Harlan, speaking for the Court, stated at p. 163:

> CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.

When a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, we believe that, to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to "perform" the programming distributed to subscribers on these imported signals. See Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (S.D.N.Y., 1943), cited in *Fortnightly*, 392 U.S. at 398, n. 23, for the proposition that "broadcasters perform." The system's function in this regard is no longer merely to enhance the subscriber's ability to receive signals that are in the area; it is now acting to bring signals into the community that would not otherwise be receivable on an antenna, even a large community antenna, erected in that area.

In *Fortnightly*, the CATV system distributed the programs to an audience to which they would not otherwise have been presented. But the Court did not find this fact significant for copyright purposes. The Court found that the CATV system made these programs available to this new audience by providing it with the services of an advanced antenna. It then reasoned that, since a television viewer was privileged to view whatever programs he could receive using any available antenna, a CATV system should not be deemed a "performer" for copyright purposes when it provided this antenna service as a commercial venture.

When a distant signal is involved, CATV is again distributing television programming to a new audience that could not otherwise have viewed it. However, in this case, the new audience is one that would not have been able to view the programs even if there had been available in its community an advanced antenna such as that used by the CATV system. The added factor in such a case is the signal transmitting equipment, such as microwave links, that is used to bring the programs from the community where the system receives them into the community in which the new audience views them. The viewer's ability to receive the signal is no longer a product solely of improved antenna technology; rather, it results from the system's importation of the signal into the CATV community from a separate, distant community.

As a result, we no longer have a system that "no more than enhances the viewer's capacity to receive the broadcaster's signals." *Fortnightly*, p. 399. We hold that when a CATV system imports distant signals, it is no longer within the ambit of the *Fortnightly* doctrine, and there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it. For this reason, we conclude that the CATV system is a "performer" of whatever programs from these distant signals that it distributes to its subscribers.

There remains, however, the difficult problem of defining what is a distant signal. The range of a television signal is a function of many factors, including the current state of broadcast and reception technology. Some of these factors, such as topography, are unchanging in a particular area. But broadcast and reception technology are in a constant state of flux. Moreover, in determining the range of a broadcast signal, it may not be enough to say that the signal is or is not receivable in the community served by the CATV system. The fact that the signal can be

received may not be meaningful unless it can project an image that is acceptable according to industry norms.

Thus, it seems clear that a precise judicial definition of a distant signal is not possible. The FCC, for purposes of the CATV signal-carriage requirements, at one time categorized signals as "distant" and "local" in terms of their ability to be received a substantial portion of the time by a substantial portion of the homes in the area by means of home antennas.[15] However, we find this definition unsuitable for copyright purposes because we believe that any definition phrased in terms of what can be received in area homes using rooftop antennas would fly in the face of the mandate of *Fortnightly*. Thus, in the absence of legislation on this matter, we must undertake to establish some standard for determining what is a distant signal for copyright purposes.

Any determination that a particular television signal is "distant" must, of course, be made with respect to its proximity to a specific local area, which we have termed the CATV community, served by the CATV system and designated in a franchise issued to it by a state or local government body or regulatory authority.[16] To say that a

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[15] This was phrased in terms of the Grade B contour, which marks the boundary along which acceptable reception of the signal is expected to be available 90 percent of the time at the best 50 percent of the locations. See 47 C.F.R. §§ 73.683 and 73.684. With respect to locations outside its Grade B contour, a signal was considered a "distant signal" by the FCC. Recently the FCC has promulgated regulations that give a broader definition of distant and local signals for purposes of the signal-carriage requirements of CATV systems. 47 C.F.R. §§ 76.59, 76.61, and 76.63. See 37 Fed. Reg. 3263 (Feb. 12, 1972).

[16] The franchise represents a grant to the CATV system of authority to run its cables through the public streets and facilities of a city, town, or county to the homes of its subscribers.

Almost 5,000 such franchises have already been granted, with the number continuing to increase. See Barnett, *State, Federal*

particular signal is already in the community, which is to say there is no need to import it through a relay or retransmittal device (such as microwave, cable, satellite, or the like), is to indicate that it can be received in the community during a substantial portion of the time by means of an antenna, such as a large community antenna or other receiving device, that is available under current technology. Thus, the meaning of "distant signal" must be determined in light of the current broadcasting and receiving technology. In this regard, we find that it is easier to state what is not a distant signal than to state what is a distant signal. Accordingly, we have concluded that any signal capable of projecting, without relay or

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and Local Regulation of Cable Television, 47 Notre Dame Lawyer 681, 702 (1972). Although the franchises have for the most part been issued by local authorities such as cities and towns, at least five states (Connecticut, Nevada, Rhode Island, Vermont, and Hawaii) have in effect laws subjecting CATV to state regulation, and more appear to be in the process of enacting such state regulatory schemes (e.g., Massachusetts, Illinois, New York and New Jersey), probably because of the disadvantages associated with local as compared with state regulation, *id.* at 698-708. Hence it may be anticipated that some state agencies may, as part of their new regulatory schemes, create local franchise areas or regions within the state based upon community of interest and population concentrations, as has been done by Connecticut. *Id.* 701-02.

As used by us, the term "CATV community" is limited strictly to the specifically designated local area for which the franchise is granted by the state or local authority, which may not be expanded or enlarged by interconnection, merger of two or more franchised areas, or other means. We do not have before us, and thus do not consider, the hypothetical case in which the area for which the franchise is granted is not local, but state-wide or comprising a broad region. We are aware of no such franchises presently granted or under consideration. For the moment, we can say that the "CATV community" we envision is essentially a local entity, the parts of which share substantial common interests.

retransmittal[17] an acceptable image that a CATV system receives off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal. This seems to us to be required by *Fortnightly*.

When the community from which the signal originates, which we term the originating community, and the CATV community are different, and when the signal is initially received by the system at a location in or near the originating community and then transmitted to the CATV community by microwave or cable, a strong presumption arises that it is a distant signal. The alleged infringer is then under a heavy burden to show that the signal is not a distant signal—that is, that it would be equally receivable off-the-air in the first instance and would project an image of similar quality, if there were substantially similar receiving equipment located in or adjacent to the CATV community. Unless this burden is met, the signal should be deemed a distant signal and the CATV system would not be within the ambit of *Fortnightly* with respect to that signal.

Similarly, when the signal is initially received by the CATV system on an antenna or other receiving device located between the originating community and the CATV community, the signal should be deemed a distant signal in the absence of a contrary showing by the CATV system.

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[17] By "relay, or retransmittal," we do not mean the authorized rebroadcast of the signal by a translator station, or the like. See note 19, *infra*, and accompanying text, where we indicate that the mere use of a translator does not, without more, make the signal a "distant signal," as that term is used in this opinion. It should be noted that microwave transmission, in the context of CATV distant-signal importation, does not constitute a broadcast or a rebroadcast. "Broadcasting" is defined at 47 U.S.C. § 153(o) as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

We do not necessarily mean that the antenna or receiving device on which the signal is initially received cannot in any case be located outside the city limits of the community that has franchised the CATV system. We can envision various legitimate circumstances, such as the desire to take advantage of a tall building, hill, or other topographical feature, that might cause the system to desire to locate its antenna or receiving device in an area closely neighboring the community that it serves. Such an antenna placement is not motivated by the desire to be closer to the signal's point of origin in order to receive it before its strength is dissipated and then to transmit to another location—presumably the motive that ordinarily underlies a system's decision to locate its antenna outside the community that it serves. Therefore, we would treat such a case in the same manner as those in which the antenna is located within the CATV community. However, we wish to make clear that the distances we envision here are small, and that any system that locates its antenna more than a few miles from the CATV community should bear the burden of showing that the signals it receives and distributes are not in fact distant signals.[18]

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[18] Teleprompter has argued that it is insulated from copyright liability by a license implied in law. This court explicitly rejected this argument in our *Fortnightly* decision. United Artists, Inc. v. Fortnightly Corp., 377 F.2d 872, 880-884 (2d Cir. 1967), rev'd. 392 U.S. 390 (1968). The Supreme Court in *Fortnightly* refused to embrace this argument when it rejected the Solicitor General's proposed compromise resolution of that case, although it did not necessarily reject this line or reasoning. See 392 U.S. 401-02. Teleprompter argues that the terms of our decision on this issue in *Fortnightly* would not necessarily apply to the facts presented by three of the five CATV systems involved here—Elmira, New York City, and Farmington. In light of our resolution of this case, we need not deal with this contention with regard to the Elmira and New York City systems. As to the Farmington system, our decision with regard to the Albuquerque stations obviates the necessity to consider the license-implied-in-law issue. *See* Part IV, *infra*. On the matter of the Durango station, *see* note 20, *infra*. In other respects, we decline to re-examine our prior decision on this issue in *Fortnightly*.

VI. *Conclusion*

In light of what we have said, we conclude that the CATV systems in New York City and Elmira were properly held not subject to copyright liability. In the case of New York City, it was stipulated that the Teleprompter system did not at any time import distant signals. As to Elmira, although it appears that the system did import and distribute one distant signal from New York City, it is stipulated that none of the programs at issue involving alleged copyright infringement were carried by that station. The remaining stations distributed by the Elmira system were stipulated to have been received by an antenna located on a hill directly neighboring the city, and were thus not distant signals. Therefore, the Elmira system was properly held not subject to copyright liability with respect to programming carried on these signals.

On the other hand, the Rawlins CATV system imported five Denver stations from a distance of 184 miles. It was on these Denver stations that the programs at issue were carried. The system received these stations on an antenna located 90 miles from Denver. Therefore, we conclude that these Denver signals were presumptively distant signals and that, in distributing the programs carried on these stations, the Rawlins system "performed" the copyrighted programs and thereby infringed appellants' copyrights. For the same reason, we hold that the Great Falls system "performed" the copyrighted programs, which were distributed to subscribers through the importation of a signal originating in Spokane, Washington (284 miles from Great Falls) and received by antennas located 55 and 67 miles from Spokane.

The Farmington system provides potentially the clearest example of distant signal importation, in that signals originating in Los Angeles, California, 600 miles away, were distributed to subscribers. However, none of the copyrighted programs at issue were broadcast by any of the Los Angeles stations. Thus, the importation of the Los

Angeles stations is not relevant to this case, and we must still determine whether the stations that broadcast the copyrighted programs were distant signals. The alleged infringements relate to programs that were carried by stations located in Albuquerque (144 miles) and Durango, Colorado (43 miles). These signals were received by the CATV system on an antenna located on a mesa 30 miles outside of Farmington. We believe that a distance of 30 miles is too great to sustain an assertion that the antenna is adjacent to the CATV community. Instead, on these facts, we must treat the system as one that has located its antenna outside the CATV community. Thus, in the absence of a contrary showing by Teleprompter, the signals should be deemed distant signals and the system should be held to have "performed" the copyrighted programs and thereby infringed the copyrights.

Of course, each system deemed to have imported distant signals must be afforded an opportunity to show that, although the receiving antenna was located outside the CATV community, the particular signal could have been received in a similar fashion by an equivalent antenna located in or adjacent to the CATV community. We seriously doubt that the Rawlins and Great Falls system could sustain this heavy burden because of the great distances involved. However, the situation may be somewhat different with regard to the Farmington system. The infringement alleged with regard to Farmington concerned programming broadcast by two CBS affiliates that the system distributed to subscribers—one from Albuquerque and one from Durango. The parties have stipulated that

> "[p]ursuant to permission granted by CBS and by [the Albuquerque affiliate], the signals [of the affiliate] . . . were rebroadcast [by a translator system] located near Farmington . . . All of the signals embodying the programs as to which infringement by the Farmington CATV is alleged . . . were rebroadcast by these translators."

It was further stipulated that, as a result of these translators, "[t]hese signals . . . could be received by residents of Farmington on rooftop antennas."

From these facts, we conclude, without the need for further showing by Teleprompter, that these Albuquerque stations could have been received by a CATV antenna located within Farmington of substantially similar sophistication to that erected on the mesa. Thus, it is clear that the Albuquerque stations were not distant signals, and there is no need to remand to the district court for findings on this point.[19] On the other hand, the stipulation indicated that the signals of the Durango affiliate were not rebroadcast and could not be received by means of rooftop antennas. Thus, if the system is unable to demonstrate that the Durango station is not a distant signal, it must then be regarded as a "performer" of the programming distributed to subscribers on that station. Since the copyrighted programs were distributed to subscribers on both the Albuquerque and the Durango stations, this leads to the conclusion that the Farmington system was a "performer," and thereby infringed the copyright, when it distributed the programs on the Durango station, but was not a "performer," and did not infringe, when it distributed the same programs on the Albuquerque station.[20]

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[19] Although these signals were receivable because they were rebroadcast by translators, our earlier statement of the governing standard, "that any signal capable of projecting, without relay or transmittal, an acceptable image that can be reached off-the-air . . . by means of an antenna . . . erected in or adjacent to the CATV community is not a distant signal," does not make the Albuquerque stations distant signals. We were not referring to an authorized rebroadcast of the signal.

[20] We do not believe that the carriage of the Durango stations falls within our reservation of decision in *Fortnightly* on the issue of license implied in law, since the Durango station's broadcasts were not receivable off-the-air by means of rooftop antennas in Farmington. *See* 377 F.2d at 884.

Although this result is somewhat lacking in symmetry, in the final analysis it will probably result in minimal damages, if any, being imposed on the Farmington CATV system; for we find it hard to see what damages appellants can have sustained, or what profits Teleprompter earned, from the carriage of the Durango broadcasts in light of the system's simultaneous non-infringing distribution of the programs on the Albuquerque CBS affiliate. By the simple turn of a knob, the viewers who saw the programs on the Durango station could have viewed them, as a result of the efforts of the same CATV system, on the Albuquerque station. However, we think that, unless the Durango station is shown not to have been a distant signal, there was at least a technical infringement of the copyright with regard to that station.

Accordingly, in light of our disposition of the issues on this appeal, we affirm the district court's holding that Teleprompter's Elmira and New York City CATV systems did not infringe appellants' copyrights; we reverse the district court's decision with regard to Teleprompter's Rawlins, Great Falls, and Farmington CATV systems, without prejudice, however, to Teleprompter to proceed in the district court within a reasonable time to show that any of these systems did not in fact import distant signals; and we remand to the district court for further proceedings, including the determination of damages, as are not inconsistent with this opinion.

The complex problems presented by the issues in this case are not readily amenable to judicial resolution. As the Supreme Court said in *Fortnightly*, "[w]e [must] take the Copyright Act of 1909 as we find it," and do the best we can. We hope that the Congress will in due course legislate a fuller and more flexible accommodation of competing copyright, anti-trust, and communications policy considerations, consistent with the challenges of modern CATV technology.

Affirmed in part and reversed and remanded in part.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Civ. 3814

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., DENA PICTURES, INC., *Plaintiffs*,

v.

TELEPROMPTER CORPORATION and CONLEY ELECTRONICS CORPORATION, *Defendants*.

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CONSTANCE BAKER MOTLEY, D. J.

I. *Introduction*

Four years ago, in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), (*Fortnightly*), the Supreme Court developed the test by which the copyright liability of community antenna television (CATV) systems was to be measured.[1] Progress in the CATV industry has

[1] "CATV" is the term generally applied by the Federal Communications Commission to facilities which receive signals over the air from television stations, modify them and distribute them by wire or cable to subscribing members of the public who pay for such service. 47 C.F.R. § 74.1101(a). The Supreme Court has also defined and applied this term. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 161-163 (1968); *Fortnightly Corp.* v. *United Artists*, 392 U.S. 390 (1968). The CATV industry

brought us the inevitable sequel to that case. We are asked here to decide whether specific differences between defendants' CATV's and those in *Fortnightly*—most importantly, transmittal of broadcast signals from stations hundreds of miles away and program origination—make defendants liable for infringement of plaintiffs' copyrights.

Defendants Teleprompter Corp. (Teleprompter) and Conley Electronics Corp. (a wholly-owned subsidiary of Teleprompter) own a large number of CATV stations throughout the United States. Plaintiff Columbia Broadcasting System (CBS) operates a television broadcasting network, furnishing programs to approximately 200 affiliated television stations. CBS owns copyrights on certain programs, and, in addition, licenses programs from the other plaintiffs who likewise produce television programs. Defendants' CATV systems receive broadcast television signals embodying plaintiffs' copyrighted material and transmit those signals to the homes of their subscribers.

The parties agreed that the activities of five of defendants' facilities located in different parts of the country would best illustrate the nature and extent of defendants' activities for purposes of decision here. These five facilities are located as follows: Elmira, New York; Farmington, New Mexico; Great Falls, Montana; New York, New York; and Rawlins, Wyoming. The activities of these five stations, including how and from where they received plaintiffs' copyrighted materials, form the basis of a lengthy stipulation of facts. It is only the legal significance of those facts which forms the core of this dispute.

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is also popularly known as "cable TV", "cablecasting", or even "broadband communications". By its tone, the designation "community antenna television" suggests a prejudgment of the issues in this case, implying as it does that CATV is no more than an antenna owned by the community. Nevertheless, because of its widespread use in at least the authoritative legal literature, we shall use "CATV" when referring to defendants' operations here.

It is also stipulated that none of defendants' stations had licenses under the copyrights from plaintiffs or from the television broadcast stations around the country which broadcast the plaintiffs' programs over-the-air, and the licenses granted by plaintiffs to stations which broadcast their programs did not authorize carriage of the programs by CATV systems.

The ultimate question before us is whether defendants "performed" plaintiffs' works within the meaning of § 1 of the Copyright Act. 17 U.S.C. § 1. In *Fortnightly*, the facts of which will be stated below, the Court addressed the issue of whether CATV's perform. Recognizing that "[t]elevision viewing results from combined activity by broadcasters and viewers," it held that broadcasters perform while viewers do not. The CATV system in *Fortnightly*, the Court concluded, fell on the viewer's side of the line and hence did not perform. This conclusion was reached by analyzing the " . . . function that CATV plays in the total process of television broadcasting and reception"; that is, whether the CATV system functioned more like a viewer or more like a broadcaster. Comparing the function of the CATV system before it to that of both the viewer and his equipment and the broadcaster, the Court found the function of CATV more similar to the former.

It is plaintiffs' contention that defendants' five CATV systems engage in activities different from those of the CATV systems in *Fortnightly*, placing defendants' systems on the broadcaster's side of the line. Specifically, the following activities are said to have given defendant's CATV systems the function of broadcasters: 1) program origination, 2) the importation of distant signals, 3) selection of programs, 4) microwave transmission, 5) interconnection with other CATV stations, 6) advertising, and 7) sale of commercials. These activities, plaintiffs charge, were either not performed by the *Fortnightly* systems or were performed to a significantly lesser degree. Singly or to-

gether, plaintiffs suggest, these differences amount to a difference of function between defendants' systems and those in *Fortnightly*.

Not surprisingly, defendants stress the similarities between their operations and those of the *Fortnightly* systems. They further contend that, regardless of whatever else their stations do, with respect to plaintiffs' programs Teleprompter is conducting a reception service identical to the one in *Fortnightly*.[2]

We are thus faced with the question of the extent to which defendants' operations differ from those of the CATV systems in *Fortnightly*, and whether these differences cause defendants to function as broadcasters, therefore "performing" plaintiffs' works within the meaning of the Copyright Act. For the reasons set forth below we find that defendants have not performed plaintiffs' works in violation of the Copyright Act. Defendants are therefore not liable for infringement of copyright.

II. *Findings of Fact*

Since many of the facts in this case were stipulated by the parties, these findings will treat only the ultimate facts relevant to the decision.

A. *Prior Proceedings*

This action was commenced on December 11, 1964. At that time *Fortnightly* was pending before Judge Herlands in this District. Efforts to consolidate this case with *Fortnightly* for purposes of trial or appeal were unsuccessful, and by agreement of the parties proceedings in the instant case were stayed pending the ultimate decision in *Fortnightly*. Plaintiffs were granted permission to file supplemental complaints on December 15, 1969 and May 17, 1971

[2] Defendants raise several other defenses we need not discuss at this point.

to include allegations concerning events up to March 31, 1971. By the pre-trial order of October 23, 1970, trial of the case was divided into stages. The first stage, which this opinion addresses, is the trial of the issue of whether there was an infringement of copyright. A trial to the court was held from September 21 through 30, 1971.

B. *Plaintiffs*

CBS as a regular part of its business creates programs for television and acquires other programs. These programs are broadcast by television stations which are affiliates of the CBS Television Network (an unincorporated division of CBS); many of these are later placed in syndication—licensed to individual television stations for broadcast.

Jack Chertok Television, Inc., Calvada Productions and Dena Pictures, Inc. are independent program packagers which create television programs that are furnished to networks and independent television stations.

C. *Defendants*

Teleprompter Corp. is a New York corporation widely engaged in CATV activities. Conley Electronics Corp. an Illinois corporation, is a wholly-owned subsidiary of defendant Teleprompter.

Defendants' CATV systems, five of which were the subject of the evidence at trial, operate generally as follows. Homeowners who subscribe to CATV pay an installation fee and a monthly charge. The monthly charge does not vary with the amount of time CATV is used or with any particular programs watched. A coaxial cable links the homeowner's television set to the CATV facility. By means of this connection, homeowners receive two general types of programming on their sets. One is programming originated by the CATV systems themselves and carried by the cable. The other type is programming received off-

the-air by CATV receivers which has been broadcast by "regular" TV broadcast stations. Frequently, the homeowner could not receive these signals via his rooftop antenna.

All of the five CATV's have the capacity to carry twelve channels to subscribers, except New York, which has a 25-channel cable link to some subscribers. None of the CATV's uses its full complement of available channels.

D. *Origination*

As mentioned above, Teleprompter's systems receive signals from television broadcast stations, modify the signals, and then carry them to subscribers' homes by coaxial cable. In addition, defendants' systems originate their own programs. This is done by transmitting programs live, on videotape or on film from the CATV station on channels not then being used for the received programs.

Some of the origination consists of a camera scan of time and weather information, printed messages, stock and news tickers, and program listings—what may be called "automatic origination."

By 1969, all five of the stations were transmitting "automatic" origination, often consisting of time and weather information, virtually 24 hours a day.

In addition to this automatic origination, the stations carry varying amounts of other program origination. At the low end of the scale, the Elmira system occasionally originates educational programming from a studio located in a city school. This material appears on the same channel as the automatically originated programs, replacing the time message and weather scan during that period. Aside from these educational shows, the only origination by the Elmira station is "automatic."

The Great Falls, Rawlins and Farmington stations originate more non-automatic programming than Elmira but

less than New York. Though neither Great Falls nor Rawlins apparently originated any programming of this nature in 1964, by 1969 both were transmitting an average of ten hours a week besides time, weather and message scans. Farmington originated an average of four and a half hours a day, seven days a week in 1964; three hours a day, five days a week in 1969; and four hours a day, seven days a week in 1971.

New York City originated approximately forty hours a week of "non-automatic" programming during June 1969. By March 1971 this figure had grown to seventy hours a week.

Programs originated by the Great Falls, Farmington, New York and Rawlins systems have a wide range of content. Though the emphasis varies in different cities, with a large amount of local coverage by all systems, the kinds of programs originated by these four CATV systems are generally similar to those normally broadcast by television stations. Thus, Teleprompter originates news, sports and weather reports, documentaries, educational and religious shows, discussions, interviews, bingo, sports events, children's shows, movies and entertainment films.

The number of hours of program origination is in all cases substantially less than the number of hours of broadcast programming transmitted by the CATV systems.

In originating programming some Teleprompter personnel perform tasks similar to those performed by people involved in broadcasting television programs. Some of the equipment used by Teleprompter stations to originate programs is also used by broadcast stations.

E. *Distant Signals*

Since "[t]he effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer,"

(*Fortnightly*, 392 U.S. at 398), it is impossible to define a precise line between a "distant" and a "local" signal. The term is applied here only to connote a distinction between signals ordinarily receivable by rooftop or tower-mounted antennas and those that are not. The plaintiffs, at least, place a great deal of importance on this difference.

All of Teleprompter's CATV systems except New York receive and carry to subscribers signals not ordinarily receivable either by house-top antennas or both house-top and tower-mounted antennas. These systems are outside the "Grade B" contour of the stations whose signals they receive and carry.

> "The Grade B contour of a television station is the boundary of a hypothetical area at whose outer limits television reception of 'a quality acceptable to the median observer' is expected to be available at least 90 percent of the time at the best 50 percent of the receiver locations, based on expected field intensities and certain assumptions as to the nature and height of the receiving antenna, and the capabilities of the television set. For the Grade A contour the pertinent figures are 90 percent of the time and the best 70 percent of the locations. These predicted contours are plotted on the basis of propagation charts and rules set forth in 47 CFR 73.684." (Stipulation No. 1, ¶ 60.)

In most instances the signals are received in the locale where they were broadcast by a receiving antenna. The signals are then carried by microwave transmission, sometimes hundreds of miles, to a microwave receiving station. From there the signals would be carried by cable, eventually to subscribers' homes.

Teleprompter's Farmington, New Mexico and Great Falls, Montana systems best illustrate this importation of distant signals. Farmington lies 144 miles from Albuquerque, New Mexico. Due to the distance and rough

topography between the two cities, television reception in Farmington of Albuquerque stations directly off-the-air by house-top or tower-mounted antennas is not feasible. Farmington CATV erected off-the-air receiving antennas on Huerfano Mesa, an elevated point about thirty miles from Farmington. Signals from the Albuquerque stations were received there, carried by microwave to the Farmington system's building in Farmington and then to subscribers by cable.[3] Signals from a station in Durango, Colorado were also received at Huerfano Mesa and carried by Farmington CATV.[4] Though Durango is only 43 miles from Farmington, mountains between the two cities prevent reception in Farmington by house-top antennas. Farmington is within the "Grade B" contour of the Durango station.

Beginning in November 1970 the Farmington CATV received and distributed signals of four television stations in Los Angeles, California, in addition to those stations mentioned above.[5] Farmington is over 600 miles from Los Angeles, so off-the-air reception of the Los Angeles station by either house-top or tower-mounted antennas is impossible. Signals of the Los Angeles stations were received off-the-air by antennas forty-seven miles from Los Angeles. They were then carried by microwave *via* twenty-three steps over a roundabout, 1300-mile route to Farmington.

It should also be noted that translators owned by the San Juan Non-Profit TV Association serve the Farmington area. The association's operations are supported by voluntary contributions from Farmington residents. A translator receives signals from a television broadcasting

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[3] The stations are KGGM-TV (a CBS affiliate), KOB-TV, KNME-TV, and KOAT-TV.

[4] KREZ-TV (a CBS affiliate).

[5] The stations are KTLA-TV, KTTV-TV, KHJ-TV, and KCOP-TV.

station, converts the carrier waves of the television signals to a new carrier frequency, amplifies them, and broadcasts them into the air. The translators in Farmington received three VHF stations located in Albuquerque and rebroadcast them on UHF frequencies.[6] Farmington residents could then receive the signals on house-top antennas. CBS and its Albuquerque affiliate, KGGM-TV, gave written permission for rebroadcast by the Association's translators.

The Great Falls CATV imports distant signals by a similar method of receiving the television broadcasts off-the-air near their source and carrying them by microwave to Great Falls. Signals are received in Great Falls from Spokane, Washington (226 miles), Lethbridge, Canada (163 miles); Salt Lake City, Utah (466 miles); and Helena, Montana (71 miles).

F. *Program Selection*

It appears that all five CATV systems carry every television broadcast station operating within their own areas. That is, any station a resident can receive by house-top antenna will also be brought to him over cable by his local CATV system. In addition, as we have seen, in all cities but New York a subscriber receives other, more distant, stations.[7]

Where they import distant signals, as described above, Teleprompter's systems make a decision about which stations should be received. Teleprompter has freedom to choose which signals from other cities to receive and transmit to each locale.

With possibly one exception, the Teleprompter CATV systems receive the signals of the television stations they

[6] The stations are KGGM-TV, KOB-TV, and KOAT-TV.

[7] The New York CATV's franchise from the City of New York specifies the television broadcasting stations to be carried by the CATV system.

carry continuously, and distribute them without editing or deletion, except for deletion of the signals of distant stations as required by the FCC's nonduplication rules. The one possible exception is the Farmington CATV, which for a period carried the signals of KREZ-TV in Durango, Colorado only in the evening hours.

Teleprompter's systems do not otherwise choose the sequence or content of programs they receive and carry to subscribers. Broadcasters determine the nature of programs to be viewed and the times they will be shown.

A viewer with an ordinary television set, of course, directly chooses the programs to be seen from those made available to him by broadcast and CATV.

G. *Microwave*

As mentioned above, Teleprompter uses microwave transmission to carry signals from its receiving antennas to its various local systems. Microwave systems beam signals from a mirowave transmitting antenna to specific microwave receiving antennas; these signals cannot be received with a television antenna. With one exception these transmitters send signals from one discreet point to another single specific location. That exception is a device called an Amplitude Modulated Link used by Teleprompter's New York facility which sends signals from one transmitter to two receiving points simultaneously.

In some cases Teleprompter owns the microwave equipment it uses (New York, some in Farmington); in others the microwave equipment is owned by an independent corporation (Elmira, some in Farmington and Great Falls). In all cases microwave serves the same function as cable in carrying signals from one point to another within the CATV system.

H. *Interconnection*

Teleprompter purchased the rights to carry to its subscribers the February 25, 1964 and May 25, 1965 heavy-

weight championship fights between Sonny Liston and Muhammed Ali. The fights were carried live to closed circuit theatres by an independent company and to Teleprompter's CATV systems in Farmington, Elmira and Great Falls by AT&T facilities. Defendants' CATV's were linked to the nationwide AT&T circuits carrying the signals. No additional or separate charge was made to subscribers for viewing the fights.

Teleprompter's New York CATV is connected by a microwave link to the two other CATV systems in New York City, as required by its franchise agreement with the City of New York.

I. *Advertising*

Teleprompter specifically advertises its originated programs in an effort to attract subscribers. It also advertises the fact that subscribers can receive distant signals that are otherwise unavailable. It cannot be said either that the originated programs are publicized only to attract subscribers to a "basic" reception service, or, on the other hand that the received programming is advertised in order to promote the "basic" sale of originated programs. Teleprompter's systems sell one basic service which includes both original programming and programming received off-the-air from broadcast stations. Teleprompter would be most likely to emphasize in its advertising whatever it thought would convince consumers to purchase this one service.

J. *Sale of Commercials*

Teleprompter's New York CATV system sold commercials for its original coverage of sporting events from Madison Square Garden, commencing on January 1, 1970. These commercial messages consisted of two ten-second "billboards" before and after the event (identifying the sponsor) and two 60-second commercial announcements

during the program. The sponsor paid a total of $300 for each sporting event. Plaintiff introduced evidence that Teleprompter intends to increase its sales of commercials in the future, but during the period covered by the pleadings in this case, no other commercials than these were sold.

III. *Conclusions of Law*

Our point of departure in determining Teleprompter's liability under the Copyright Act is the Supreme Court's decision in *Fortnightly*. As mentioned above, *Fortnightly* held that the copyright liability of CATV "depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception," (at 397). Finding that television viewing results from the combined activity of broadcasters and viewers, the Court concluded that broadcasters perform while viewers do not. Our task, as the parties recognize, is to decide whether Teleprompter's systems "function" as broadcasters or as viewers.

Though it found the CATV systems before it to be on the "viewer's side of the line" (at 399), the *Fortnigstly* Court did not delineate the "functions" of a viewer and his receiving equipment. Rather, it analogized the function performed by CATV to that of "a well-located antenna with an efficient connection to the viewer's television set." *Id.* Both "received and delivered" electronic information (at 399 n.27). Whether this well-located antenna was owned by one homeowner, several homeowners or an entrepreneur did not affect its function in the Court's view.

The Court did set forth the important functions of broadcasters and compared them with the functions of the *Fortnightly* CATV systems:

> "Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV sys-

tems receive programs that have been released to the public and carry them by private channels to additional viewers." (citations omitted) (at 400)

Other distinguishing features of broadcasters were added in a footnote. Broadcasters sell their time and facilities to sponsors while CATV's do not. CATV's, on the other hand, charge the public for the right to view their offerings; broadcasters do not. Unlike broadcasters, CATV's have no influence on program content and arrangement. [at 400, n.28, citing *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F.Supp. 315, 325 (D. Ida. 1961).].

The Court's application of the functions of broadcasters and viewers provides only the broadcast guide to analyzing the function of the CATV systems before us.[8] *Fortnightly* did not make clear, for example, how many functions common to broadcasters a CATV system must fulfill for it to fall on the broadcaster's side of the line or, indeed, the extent an operation need be carried on for it to be found a "function." Nor does *Fortnightly* deal with instances where a CATV system simultaneously performs some functions of a viewer and some of a broadcaster, as in the case before us.

Since under *Fortnightly's* functional analysis test, the *Fortnightly* CATV systems functioned as viewers and consequently fell on the viewer's side of the line, our approach must be to compare *Fortnightly's* CATV's with the ones before us in order to isolate the differences between the two. We shall then explore whether those differences, singly or in combination, cause Teleprompter's CATV's to

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[8] Justice Fortas stated in his *Fortnightly* dissent: "The vague 'functional' test of the meaning of the term 'perform' is . . . unsatisfactory." (at 407). See also Comment, *The Copyright Law and Its Relevance to CATV*, 19 Buff.L.R. 65, 81-82 (1969).

"function" so differently from those in *Fortnightly* as to place Teleprompter on the broadcaster's side of the line.

At the outset we can dispense with certain minor features of Teleprompter's CATV's that do not effect a significant change in function, though they did not exist in *Fortnightly*. These features are the use of microwave, interconnection, advertising, and the sale of commercials. Plaintiffs contend that defendants' CATV's are operating like broadcasters by using microwave, since microwave transmits signals through the air. Broadcasters propagate signals over-the-air, the argument goes; and since the microwave transmitters used by Teleprompter do also, Teleprompter, we are told, is functioning as a broadcaster. However, a broadcaster sends out signals to the public while, as we have found, Teleprompter uses microwave to carry signals from one of its facilities to another; no homeowner receives Teleprompter's microwave transmissions. Its use of microwave is thus completely analogous to the use of cable as a connecting carrier. Not every over-the-air transmission of signals by electromagnetic energy is a broadcast, human speech being just one example.

Nor does interconnection of several Teleprompter CATV's with closed-circuit theaters for the Liston-Ali fights make these CATV systems into a broadcast network. This interconnection occurred on two separate, temporary and special occasions. Teleprompter's CATV's were interconnected only in the sense that several of them were linked to the same independent nationwide circuits. Whatever this brief interconnection may portend for the future, it does not transform defendants' present CATV systems into a broadcast network as plaintiffs suggest.

Defendants' advertising efforts are somewhat similar to those of the *Fortnightly* systems. One CATV system in that case advertised that it afforded access to a greater number of channels than an ordinary antenna. 255 F.Supp.

177 (S.D.N.Y. 1966).* Teleprompter makes similar contentions about the numbers of otherwise unavailable channels its subscribers can receive.

The unique aspect of Teleprompter's advertising is its mention of programs originated by the CATV; as will be noted below, the *Fortnightly* systems originated only time and weather scans. We fail to see though how emphasis on its originated programs changes Teleprompter's function. This type of advertising demonstrates, of course, that Teleprompter felt its unique service would be more attractive to consumers if original programs were offered. But if any change in function occurred because of origination, it was due to the origination itself, not to Teleprompter's advertisement of that fact.

Nor do we find decisive significance in the sale of commercials to accompany Teleprompter's origination of sporting events in New York City. While the Supreme Court described commercial sponsorship as an attribute of a broadcaster, it was listed as merely one of a number of indicia of broadcasting not as a sole determinant. The sale of commercials in the case before us was small in both the amount of money involved and in relation to the amount of programming carried by the New York CATV. Importantly, these commercials were sold and carried as part of the programming *originated* by Teleprompter, and not in connection with its transmittal of over-the-air broadcasts. Of course, both types of programming were part of the same overall service, and, realistically, some of the audience for the commercials was at least partly attracted to Teleprompter by its "reception service." But the commercials were not inserted in the midst of the received programs, and the sponsor seems to have geared the commercials closely to the originated sports events.

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* *United Artists Television, Inc.* v. *Fortnightly Corporation.*

We come now to Teleprompter's importation of distant signals—the retransmission of broadcast signals that cannot be received on rooftop or tower-mounted antennas. This function is a salient feature of the Farmington, Great Falls and Rawlins CATV's and is also present in Elmira. It is almost certainly responsible for much of the business of the first three of these systems.

Plaintiffs contend that Teleprompter is engaging in broadcasting by bringing signals into a new locale. In plaintiffs' view, importation of distant signals differentiates this case from *Fortnightly*, whose CATV's functioned "merely as an auxiliary antenna to enhance the quality of the television picture. . ." (Plaintiffs' pre-trial brief at 8, 19). Plaintiffs thus urge us to limit the copyright immunity resulting from *Fortnightly* to those CATV's which "enhance" the quality of picture that can already be received in the locale.

A reading of the *Fortnightly* opinions of the District Court, Court of Appeals and Supreme Court reveals that the *Fortnightly* systems did more than "enhance" poor quality pictures—they in fact brought in stations from which usable reception could not be had at all. All of the courts recognized that the *Fortnightly* CATV's carried broadcasts to *additional* viewers.

Fortnightly involved two CATV's, one in and around Clarksburg, West Virginia, and another in and around Fairmont, West Virginia, eighteen miles from Clarksburg. Clarksburg is located approximately 82 miles from Pittsburgh, 57 miles from Wheeling, West Virginia, and 74 miles from Steubenville, Ohio—the cities from which it received broadcast signals. Fairmont, which received the same signals, is 67, 52 and 65 miles from those cities respectively. The *Fortnightly* systems had antennas on hills above Clarksburg and Fairmont, connected by coaxial cables to individual subscribers.

District Judge Herlands found that:

> "No credible competent evidence was adduced which demonstrated that the residents of Clarksburg or Fairmont, other than the subscribers to defendant's systems, could receive a usable and reasonably satisfactory picture from any of the five stations in Pittsburgh, Wheeling or Steubenville." 255 F.Supp. at 186, *aff'd* 377 F.2d 872, 883 n. 14 (2d Cir. 1967).

Judge Herlands also found as a fact that:

> "The basic purpose of defendant's CATV systems . . . is to process and retransmit signals of a television broadcast station to areas in which direct reception by ordinary home antennas of such television broadcast is unsatisfactory because of distance, intervening topographical conditions, or similar factors." 255 F.Supp. at 196.

The Court of Appeals cited Judge Herlands' first finding above in stating that "[t]he hilly terrain in and around Clarksburg and Fairmont makes reception by normal rooftop antennas of television programs broadcast by the Pittsburgh, Steubenville and Wheeling stations difficult or *impossible.*" 377 F.2d 872, 874 (2d Cir. 1967) (Emphasis added).

The Supreme Court treated the *Fortnightly* case as one where most residents of the areas involved could not receive broadcasts of other than local stations by ordinary rooftop antennas. 390 U.S. at 391. It went on to distinguish CATV systems from broadcasters on the ground that the former "receive programs that have been released to the public and carry them by private channels to *additional* viewers."[9] 390 U.S. at 400 (Emphasis added).

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[9] In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 162 (1968), decided a week before *Fortnightly*, the Court stated that CATV systems "may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae."

It is clear, then, that Teleprompter's importation of signals not receivable on rooftop antennas is no different from that in *Fortnightly*. This case differs from *Fortnightly* in that in a number of the systems the antenna tower receiving the signals is located not on a hill over the city but many miles away in the vicinity of the broadcasting station. Farmington, as we have seen, receives Los Angeles stations whose signals are received off-the-air near their point of origination and relayed by microwave to New Mexico. Does this greater distance alone between the receiving antenna and the CATV station and its customers change the function of the *Fortnightly* reception service? To put the question another way, did the Supreme Court mean to imply a geographical limit beyond which signals could not be imported? Though the Court, of course, was concerned with the system before it, which imported signals from a maximum distance of 82 miles, there is no indication that it intended to imply a geographical limit.[10] In fact, the Supreme Court in *Fortnightly* explicitly declined to make copyright liability dependent on the distance the

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[10] Justice Fortas, in dissent, may have understood the majority to have been impliedly limiting the distance signals could be carried when he wrote:

> "It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little more than a 'cooperative antenna' employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves." 390 U.S. at 407.

It is also possible that Justice Fortas thought that such a geographical distinction *should* have been made by the majority but was *not*.

broadcast signal was carried by a CATV. There the Court said:

> "We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation.** That job is for Congress. We take the Copyright Act of 1909 as we find it. With due regard to changing technology, we hold that the petitioner did not under that law 'perform' the respondent's copyrighted works." 390 U.S. at 401-402. (Other footnotes omitted)

Furthermore, the Court's reasoning in *Fortnightly* would not support our creation of a difference between signals received on a local tower and signals received on a distant one. "The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer." *Id.* at 398. Here, the "viewer" (the CATV system) has, by supplying more sophisticated equipment, enlarged the effective range of the broadcast, just as the CATV in *Fortnightly* enlarged the range of broadcasts with its tower on a hill. The Court's description of a CATV in *Fortnightly*

** The Solicitor General would have us hold that CATV systems do perform the programs they carry, but he would have us "imply" a license for the CATV "performances." This "implied in law" license would not cover all CATV activity but only those instances in which a CATV system operates within the "Grade B Contour" of the broadcasting station whose signal it carries. The Grade B contour is a theoretical FCC concept defined as the outer line along which reception of acceptable quality can be expected at least 90% of the time at the best 50% of locations. Sixth Report and Order, 17 Fed. Reg. 3905, 3915. Since we hold that the petitioner's systems did not perform copyrighted works we do not reach the question of implied license.

is equally apt for this case: "Essentially a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set." *Id.* at 399. What Teleprompter has done is to make its antenna even more "well-located" and even more "efficiently" connected to a viewer's set than in *Fortnightly*.

If a viewer erected an antenna on a hill, the Court said, he would not be performing the programs he received. *Id.* at 400. Nor, it would seem, would a viewer be "performing" if he set up a strategically-placed antenna miles from his home and brought in signals from that antenna. The fact that the same operation is conducted here as a commercial enterprise by a viewing innovator does not change its function—which is to "enhance the viewer's capacity to receive the broadcaster's signals." We therefore find that Teleprompter's importation of distant signals does not cause it to function as a broadcaster.

Plaintiffs contend that the importation of distant signals allows defendants greater latitude in program selection and that this latitude makes them more like broadcasters than viewers. We have found that Teleprompter's practice of importing distant signals allowed it to exercise discretion in choosing which distant signals to import. It is not clear from the record what freedom the *Fortnightly* systems had to select the broadcast stations they would carry. Because they received broadcast signals on a single antenna located near the area it served, the *Fortnightly* CATV's had less control over program selection than CATV's that would mount antennas near selected broadcast stations in other cities. But though Teleprompter has greater freedom of choice than *Fortnightly* its latitude is not comparable to that of a broadcaster, which controls program content and scheduling.

Perhaps the most striking difference between this case and *Fortnightly* is Teleprompter's program origination.

The *Fortnightly* CATV's transmitted messages by video scanner and no more. 255 F.Supp. at 197. The Supreme Court in *Fortnightly* did not find this meager origination of significance and explicitly excluded from consideration CATV systems originating their own programs. 390 U.S. at 392 n.6.

Due to the development of the CATV industry, we are here squarely faced with CATV systems that do originate a substantial amount of their own programming. We have found that the CATV's originate "automatic" transmissions around the clock, and all originate substantive programs to some degree, ranging from a few hours a week in Elmira to seventy hours a week in New York as of March 31, 1971. We have also found that the content of these shows is not significantly different from those of ordinary broadcast stations. As far as we can tell, the volume and variety of program origination by CATV will probably increase in the future. In fact, though we need not decide if it is a defense to potential copyright liability as defendants urge, it is worth noting that the Federal Communications Commission does require non-automatic program origination by most CATV systems. 47 C.F.R. § 74.1111.[11]

We do not doubt that Teleprompter's program origination is similar to that done by broadcasters. These CATV's select the programs, propagate them, and have control over program content and arrangement. Teleprompter's New York system sells commercials for a portion, albeit small, of its originated schedule. Certainly New York originates at least as many hours of programming as many local broadcast stations. With respect to its program origination Teleprompter is functioning as a broadcaster.

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[11] Teleprompter argues that to find copyright liability because of program origination demanded by the F.C.C. would be unconscionable. *Cf. Farmers Union* v. *WDAY*, 360 U.S. 525, 531 (1959).

We are thus faced with the question of whether a CATV's function as a broadcaster with respect to program origination affects the nature of the function it performs in receiving and re-transmitting over-the-air broadcasts. We are of the opinion that the copyright liability for the "reception service" should not be affected by what can be considered an unrelated function—program origination. It is true that the originated programs and the received programs are sold to subscribers as a package; nobody buys one without the other. But the nature of the function of a CATV with respect to received shows is not changed by the presence of original material on other channels or at other times. What Teleprompter is doing to plaintiffs' copyrighted material, and other over-the-air broadcasts, is the same whether the CATV's originate programs or not. The "function" of the reception service is not changed by simultaneous sale of original shows, just as it would not be changed by Teleprompter's simultaneous delivery of free ice cream or candy to every subscriber.

Having examined the separate activities which plaintiffs feel put defendants on the broadcaster's side of the line it may be appropriate to look at defendants' systems as a whole. It is somewhat difficult to apply either the term "viewer" or "broadcaster" to the CATV systems in their entirety in this case. As we have already seen, these CATV's perform two functions: 1) delivery of the signals of over-the-air broadcast stations, and 2) transmission of original television programs. It often cannot fairly be said that one is the predominant function. The service sold by Teleprompter is the combination of these functions, not either in isolation.

Beyond the "functional test" we have discussed at length and attempted to apply, it may be that the lesson of *Fortnightly* is, as the Eighth Circuit Court of Appeals says in another context: "broadcast signals are dedicated to the public." *Midwest Video Corp.* v. *United States,* 441 F.2d

1322, 1326 (8th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3314 (U.S. Jan. 10, 1972).[12] Certainly, that is one conclusion that can be drawn from the Supreme Court's first finding that the range of a viewer is determined by the equipment of both the broadcaster and the viewer, and then analogizing a CATV to a viewer's antenna. For if a CATV is like a viewer and a viewer by his choice of equipment can determine the range of a broadcast, then there seems to be little limit to what can be done with broadcast signals by CATV's. The result indeed may be that "the right to receive and distribute [signals] may be exercised by any one with the capacity to capture the signals." *Id.* at 1327.

It should be remembered that our task here is to decide whether what defendants do infringes plaintiffs' exclusive rights under the Copyright Act of 1909, 35 Stat. 1075, as amended, specifically § 1, 17 U.S.C. § 1, by "performing" plaintiffs' copyrighted works. In construing the Copyright Act in the years since 1909 the courts have built on the basic analogy of the producers of a stage play and their audience; the producers perform the play, the audience does not. See 390 U.S. at 395 n. 15. This metaphor was then analogized to the dichotomy between a listener and a broadcaster, see e.g. *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925); *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 201 (1931), which in turn was used as a model for differentiating a broadcaster from a non-infringing CATV in *Fortnightly*. We have here carried this analogy yet another step by comparing the instant CATV's with those in *Fortnightly*. Undoubtedly, future technological change, drastic and other-

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[12] It has been observed that this result is quite similar to that which would follow from defendants' license-implied-in-law argument. Comment, *supra*, note 8, at 79-80.

The issue in *Midwest Video* is whether the Federal Communications Commission has the power to require existing cable television systems to originate programming.

wise, will see the courts asked to take further steps. Perhaps the time has come to cease piling analogy on analogy and to await word from Congress.

The copyright monopoly is "wholly statutory", *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 15 (1908) and we should perhaps be reluctant to expand an exception to the general disfavor of monopolies in the absence of a more precise expression of Congressional intent, particularly in light of the considerations of national communications policy that Congress may want to bring to bear on the CATV industry.

In any case, taking the law in its present state, we find that the CATV's before us do not function as broadcasters within the meaning of the *Fortnightly* test, that they therefore do not "perform" plaintiffs' works, and hence do not infringe their copyrights. We, of course, do not reach any of defendants' arguments other than those considered above.

Settle order on five days' notice.

Dated: New York, New York

May 2, 1972

/s/ CONSTANCE BAKER MOTLEY
Constance Baker Motley
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Civ. 3814

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED, *Plaintiffs*,

—against—

TELEPROMPTER CORPORATION and CONLEY ELECTRONICS CORPORATION, *Defendants*.

Judgment

On October 22, 1970, in Pre-Trial Order Number One, this Court having ordered that the trial of the above-entitled case be divided into stages and the first stage be the determination of the basic issue of copyright infringement and certain other defenses specified in the Order, with other defenses asserted by the defendants reserved without prejudice for trial, if necessary, in subsequent stages; and

On June 15, 1971, in Pre-Trial Order Number Three, this Court having ordered that the trial of the first stage of the 16th and 17th Claims for Relief set forth in the Second Supplemental Complaint be governed by Pre-Trial Order Number One; and

The issues to be tried at the first stage of the trial having been formulated by this Court in said Pre-Trial Order Number One and Pre-Trial Order Number Three as follows:

> The basic issue to be tried in this stage of the case is whether there is an infringement of copyright within the meaning of 17 U.S.C. §§ 1(c) and (d) by reason of the reception, transmission of and making available (and/or other activities as specified in paragraph IV hereof, if any, in relation to) telecasts of plaintiffs' copyrighted programs by means of CATV systems in Elmira, New York, and Farmington, New Mexico, in

November 1964, as alleged in the Amended Complaint, and the CATV systems in Farmington, New Mexico, Rawlins, Wyoming, Great Falls, Montana, and New York, New York, in June 1969, as alleged in the Supplemental Complaint. Paragraph 1 of the Answer to Supplemental Complaint and Supplemental Answer is related to the issue of copyright infringement and shall be included in the first stage. The defendants' separate defenses stated in paragraph 113 and 114, and 115 (f) of the Amended Answer and 14 and 15, and 16 (f) of the Answer to Supplemental Complaint and Supplemental Answer, excluding, however, any allegations therein of violations of the antitrust laws, may be related to the issue of copyright infringement, the Communications Act defense and to the defense of license implied in law and shall be included in the first stage. (Pre-Trial Order Number One).

All of the provisions of Pre-Trial Order Number One are hereby extended and made applicable to the 16th and 17th Claims for Relief in the Second Supplemental Complaint, and the trial of the first stage of such 16th and 17th Claims for Relief shall be governed by Pre-Trial Order Number One. (Pre-Trial Order Number Three)

The aforesaid issues having been duly tried before the undersigned and the Opinion of this Court dated May 2, 1972, having been filed herein, holding that the defendants' CATV systems involved in this case "do not 'perform' plaintiffs' works and hence do not infringe their copyrights", thereby disposing of the basic issue of copyright infringement in favor of the defendants so that it is not necessary for trial to be held or other disposition to be made on the merits of any of the other issues raised by the defendants herein and reserved without prejudice for subsequent stages of the trial; and

The defendants Teleprompter Corporation and Conley Electronics Corporation having applied to this Court for judgment in their favor against the plaintiffs Columbia Broadcasting System, Inc., Calvada Productions, Jack Chertok Television, Inc. and Dena Pictures, Incorporated, dismissing the Amended Complaint and First and Second Supplemental Complaints herein with costs in this Court, and for the allowance of reasonable attorney's fees pursuant to 17 U.S.C. § 116, and the affidavits of Robert C. Barnard, sworn to June 8, 1972 and Walter C. Schier, sworn to June 8, 1972, having been submitted in support thereof;

Now, Therefore, upon motion of Cleary, Gottlieb, Steen & Hamilton, and Katz, Schier, Rosensweig & Sindle, attorneys for the defendant Teleprompter Corporation and Conley Electronics Corporation, it is

Adjudged, that the Amended Complaint and First and Second Supplemental Complaints be, and they hereby are, dismissed on the merits and that the action herein be and the same hereby is dismissed; and it is further

Adjudged, that the defendants Teleprompter Corporation and Conley Electronics Corporation recover of the plaintiffs Columbia Broadcasting System, Inc., Calvada Productions, Jack Chertok Television, Inc. and Dena Pictures, Incorporated the costs of this action in this Court to be taxed by the Clerk herein pursuant to 17 U.S.C. § 116; and the application by said defendants for legal fees is hereby denied.

Dated: New York, New York
June 27, 1972

s/ C.B.M.
Constance Baker Motley
United States District Judge

APPENDIX C

Statutes Involved

1. *Copyright Act, as amended.* Section 1(c) and (d) of the Copyright Act (17 U.S.C. §§ 1(c), (d) (1970)) provides as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> • • •
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

2. *Communications Act of 1934, as amended.* Section 1, 3(o), 303(c), (d), and (h), 307(b) and 325(a) (47 U.S.C. §§ 151, 153(o), 303(c), (d) and (h), 307(b) and 325(a) (1970)) provide as follows:

Sec. 151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

Sec. 153(o). " 'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

Sec. 303. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . ."

• • •

(c). "Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;"

• • •

(d). "Determine the location of classes of stations or individual stations;"

• • •

(h). "Have authority to establish areas or zones to be served by any station."

Sec. 307(b). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Sec. 325(a). "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and seventy-three.

Present:

Hon. J. Edward Lumbard

Hon. Irving R. Kaufman

Hon. Walter R. Mansfield

Circuit Judges,

72-1800

COLUMBIA BROADCASTING SYSTEM, INC.,
CALVADA PRODUCTIONS, a joint venture,
JACK CHERTOK TELEVISION, INC. and
DENA PICTURES, INCORPORATED,
Plaintiffs-Appellants,

v.

TELEPROMTER CORPORATION and CONLEY ELECTRONICS CORPORATION, *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District

Court be and it hereby is affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings, including the determination of damages, as are not inconsistent with the opinion of this court.

A. DANIEL FUSARO
Clerk